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No. 84-755

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

vs.

ROSA ELVIRA MONTOYA de HERNANDEZ, RESPONDENT

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Respondent ROSA ELVIRA MONTOYA de HERNANDEZ hereby files a brief in opposition to the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 731 F.2d 1369.

QUESTION PRESENTED

WHETHER RESPONDENT, WHO WAS SUSPECTED OF ATTEMPTING TO SMUGGLE CONTRABAND DRUGS CARRIED WITHIN HER BODY AND WHO REFUSED TO SUBMIT TO AN X-RAY, COULD LAWFULLY BE DETAINED AT THE BORDER BY CUSTOMS OFFICERS FOR THE PERIOD OF TIME NECESSARY TO EXAMINE HER BOWEL MOVEMENTS.

STATEMENT OF THE CASE

The evidence below showed that shortly after midnight on March 5, 1983, Rosa Elvira Montoya de Hernandez arrived at the Los Angeles International Airport on a flight from Bogota, Colombia. After deplaning, Ms. de Hernandez proceeded to an immigration checkpoint where her travel documents were inspected. R.T. 6-7.^{1/} Her passport and visa were found to be in order, and both Ms. de Hernandez' passport and the Immigration I-94 Form were stamped "admitted". R.T. 6-7. Ms. de Hernandez then proceeded to a customs line.

Customs officials reviewed her documents and directed Ms. de Hernandez to a secondary inspection area for a more thorough examination.^{2/} There, United States Customs Inspector Jose Serrato reviewed Ms. de Hernandez' passport, visa and airline tickets, and questioned her about her trip

^{1/} R.T. refers to reporter's transcript.

^{2/} Although the record in this case does not reflect why Ms. de Hernandez was referred from the primary to the secondary inspection area, the Fifth Circuit, in *United States v. Mejia*, 720 F.2d 1378 (5th Cir. 1983) addressed that issue in light of the facts of that case:

"After routine preliminary questions, the customs officer sent Mejia to the secondary area because Mejia spoke no English and because he was arriving from a country known to be a source of narcotics. 720 F.2d at 1380

Like, Mejia, Ms. de Hernandez spoke no English, and was arriving from Colombia. E.R. 123-124.

to the United States. E.R. 84.^{3/} Her travel documents were in order and she was traveling on a valid Colombian passport. R.T. 8. Inspector Serrato noticed that Ms. de Hernandez' passport reflected at least eight previous trips to the United States. E.R. 84. Inspector Serrato asked Ms. de Hernandez about the following topics:

1. The purpose of her trip.
2. How long will she stay.
3. Did she have any agricultural products.
4. Did she have \$5,000 in any currency.

E.R. 84.

Ms. de Hernandez told Inspector Serrato that she was coming to the United States on a business trip to buy merchandise, including clothing and small appliances, for her husband's store in Colombia. R.T. 17-18. Ms. de Hernandez showed Inspector Serrato a book of invoices containing receipts with her name on them, showing past buying trips at retail outlets on previous occasions when she was in this country. R.T. 18-19 (see Exhibit 102, received in evidence at the suppression hearing in the district court, R.T. 19). Inspector Serrato looked at the book of invoices and receipts. R.T. 18. Ms. de Hernandez then showed Inspector Serrato a business card from her husband's business in Colombia. R.T. 19-20.

In response to Inspector Serrato's further questions, Ms. de Hernandez told him that she had no family or friends in the United States, and that she would visit the stores in which she wished to make purchases by taxi. E.R. 123. Ms. de Hernandez had over \$5,000.00 in cash in her possession. E.R. 124.

^{3/} E.R. refers to the excerpt of record submitted to the court of appeals.

Inspector Serrato next examined Ms. de Hernandez' luggage and purse and noted the following:

"Ms. de Hernandez' purse, at the time that she came into customs, contained the following: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, eye shadow; a purse containing perfume, hand cream, toothbrush, tooth paste, hairbrush, handkerchief, pictures of two children, a pen, and some U.S. currency;

A suitcase containing nightgown, a 500 peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted bras, panties and socks, two sweaters, and a brown skirt". R.T. 10.^{2/}

Based upon the foregoing investigation, and after summoning another Customs inspector to seek his advice, Inspector Serrato formed the opinion that Ms. de Hernandez fit the profile of persons suspected of carrying drugs concealed in their bodies. E.R. 123.

^{2/}Inspector Serrato's sworn declaration, deemed his testimony on direct at the suppression hearing (R.T. 4), contained the statement that, when he examined Ms. de Hernandez' luggage, he noticed "no toiletries". E.R. 84. At the hearing, this was shown to be false. R.T. 10, 43.

Petitioner states that Ms. de Hernandez "carried little extra clothing or toiletries." (petition for certiorari, p.2). This statement mischaracterizes the facts. It might well be asked "little in relation to what?". Ms. de Hernandez was apparently never asked the length of her intended stay. Compare, United States v. Padilla, 729 F.2d 1367 (11th Cir. 1984) ("a few pairs of dungarees, a couple of T-shirts, and very little (sic) toiletries," which was "considered unusual for a visit of ten days." 729 F.2d at 1368.

Inspector Serrato thereupon directed that Ms. de Hernandez be taken to a search area for a pat-down search by a female customs inspector. E.R. 84. This "pat-down" search became a strip search. E.R. 98, R.T. 21, 37-38. The strip search failed to produce any evidence to support Inspector's Serrato's suspicions. R.T. 21, 37-38.

Inspector Serrato next asked Ms. de Hernandez to consent to an x-ray search. Ms. de Hernandez initially indicated she would consent, but later withdrew her consent. R.T. 21-22.

After Ms. de Hernandez had withdrawn her consent for an x-ray, she requested permission to call her husband. Inspector Serrato denied her request. Ms. de Hernandez then asked if Inspector Serrato would call her husband to verify the information she had provided. She offered to give the inspector the telephone number to do so. Inspector Serrato did not call her husband. R.T. 23.

REASONS FOR DENYING THE PETITION

Petitioner contends that a writ of certiorari should be granted because the decision of the Ninth Circuit Court of Appeals in this case is in direct conflict with a decision of the Eleventh Circuit Court of Appeals in United States v. Mosquera-Ramirez, 729 F.2d 1352 (11th Cir. 1984). Respondent disagrees. The two cases are distinguishable on their facts.

Mosquera-Ramirez, like Ms. de Hernandez, arrived on a non-stop flight from Bogota, Colombia shortly after midnight. Like Ms. de Hernandez, he presented himself and his luggage for customs clearance before a customs inspector, and was questioned about the purposes of his

trip. There the similarity ends. Mosquera-Ramirez presented an inherently incredible story concerning the purpose of his trip. He could not answer some questions. 729 F.2d at 1354. He gave inconclusive answers to other questions. 729 F.2d at 1355. He had no credit cards, checks or letters of credit, and insufficient cash to accomplish the alleged purpose of his trip. When confronted with this fact, Mosquera-Ramirez was unable to explain the inconsistency. 729 F.2d at 1354. He could not give a definite itinerary for his stay in Miami. When the agents noticed that Mosquera-Ramirez' passport indicated that he had traveled to Miami just two months previously, Mosquera-Ramirez "became very evasive and very nervous." 729 F.2d at 1354. When further questioned, Mosquera-Ramirez admitted that he was not in the billiards business, as he had originally claimed, but just worked at a billiards hall. 729 F.2d at 1354.

In holding that Mosquera-Ramirez' "articulably suspicious behavior" raised a reasonable suspicion, the Eleventh Circuit Court of Appeals noted that "a suspicion may be reasonable even though it rests substantially on the inability to give a credible explanation for a trip to this country." 729 F.2d at 1354.

In the case petitioner now seeks to convince this Court to review, none of the articulably suspicious behavior which supported an x-ray search in Mosquera-Ramirez was present. There was no evidence here of an inherently incredible story, no evidence of failure to answer questions, no evidence of evasive or nervous behavior, no evidence of lack of a definite itinerary, no admission to giving inaccurate information, or any of the other objective indicia of drug smuggling. There was no evidence of passport or visa

tampering, no evidence of possession of anti-diarrhea medication or laxatives,^{3/} no evidence that Ms. de Hernandez' body movements were restricted or stiff^{4/}, no evidence of disorientation,^{5/} no evidence of recent drug use such as glazed or dilated eyes, needle marks on the arms, or slurred speech,^{6/} no tip from a confidential informant indicating Ms. de Hernandez would be smuggling drugs into the country^{7/}, and no evidence from the Customs Bureau computer that Ms. de Hernandez had previously been involved in narcotics smuggling ^{8/}. Instead of being unemployed with a large amount of cash, Ms. de Hernandez presented evidence of being employed, and the cash that she possessed was directly related to the stated purpose of her trip. As the Eleventh Circuit stated in United States v. Vega-Barvo, 729 F.2d 1341 (1984):

"Since swallows follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example, suspicion will not focus on bulky dress, . . . but on the traveler's inability to explain his or her trip. Id at 1350.

^{3/}United States v. Mendez-Jiminez, 709 F.2d 1300, 1302 (9th Cir. 1983).

^{4/}United States v. Shreve, 697 F.2d 873, 874 (9th Cir. 1983).

^{5/}United States v. Pino, 729 F.2d 1357, 1358 (11th Cir. 1984).

^{6/}United States v. Cameron, 538 F.2d 254, 255 (9th Cir. 1976).

^{7/}United States v. Couch, 688 F.2d 599, 600 (9th Cir. 1982).

^{8/}United States v. Aman, 624 F.2d 911, 912 (9th Cir. 1980).

Although "reasonable suspicion" is admittedly a less stringent standard than "clear indication", nevertheless, even the reasonable suspicion standard requires a showing of articulable facts which are particularized as to the person and as to the place to be searched." United States v. Vega-Barvo, 729 F.2d 1341, 1349.

It is instructive to compare the facts of this case with the facts of recent Eleventh and Fifth Circuit Cases applying the reasonable suspicion standard to uphold x-ray searches by Customs agents at the border:

1. United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984) (manifest inconsistencies in explanation of purpose of trip, no business cards, extreme nervousness, pulsating carotid artery, suitcase contained "rags") 729 F.2d at 1343, 1350.

2. United States v. Pino, 729 F.2d 1357 (11th Cir. 1984) (claimed to be on business trip to buy television repair parts, yet was unable to name a single part to be purchased, "no business cards, manuals, forms or other business related accouterments," evasive, "did not know" answers to some questions, unusually nervous and disoriented throughout the inspection) 729 F.2d at 1358.

3. United States v. Castenada-Castenada, 729 F.2d 1360 (11th Cir. 1984) (extreme passivity, claimed to be a business man but "ridiculous" answers to questions about occupation, travel documents incorrectly completed, nervousness, pulsating carotid artery, rough, red hands indicating manual labor in the face of claim of middle or upper-middle class life, airline ticket for New York in the face of claim of intention to vacation at Disneyworld) 729 F.2d at 1362, 1363-64.

4. United States v. Menao-Castano, 729 F.2d 1364 (11th Cir. 1984)(claimed that airplane ticket was purchased on May 10 for cash, when face of ticket revealed it was purchased May 23 on credit, claimed to own electronic parts store and to sell televisions, but had no business card, knew names of no stores he planned to visit, and could not answer, or answered incorrectly, even superficial questions about televisions) 729 F.2d at 1365.

5. United States v. Padilla, 729 F.2d 1367 (11th Cir. 1984)(claimed to be a businessman but no business cards or other identification, "incongruous," "wildly implausible" story concerning purpose of visit: a plan to purchase three or four Xerox color photocopying machines with \$971.00 cash, maintained that \$971.00 enough to cover purchase, and related that machines would be transported back with him in a single piece of luggage, had no idea where such machines could be purchased, claimed to have hotel reservations at a particular hotel, which claim was shown to be false) 729 F.2d at 1368.

6. United States v. De Montoya, 729 F.2d 1369 (11th Cir. 1984)(lied about her conduct during the flight, claimed to have husband and children, but had no pictures of her family, claimed that husband an engineer but unable to say what kind of engineer, claimed that her suit was new, but unable to button it over bulging stomach, discrepancy between social status claimed and her appearance and poor quality personal effects) 729 F.2d at 1370-71.

7. United States v. Mejia, 720 F.2d 1378 (5th Cir. 1983) (airplane tickets contradicted declared itinerary, claimed to be a businessman on a buying trip, but not dressed as a businessman, no business suits in luggage, no

business cards, hands calloused consistent with manual labor) 720 F.2d at 1380.

Unlike the aforementioned cases, there was nothing unusual in Ms. de Hernandez' papers, responses, conduct, demeanor, appearance or personal possessions which warranted even a reasonable suspicion. Not even the Eleventh and Fifth Circuits permit an x-ray search based upon an inarticulate hunch. In the instant case, there were simply no articulable particularized facts which would have amounted to a reasonable suspicion that Ms. de Hernandez was internally smuggling narcotics. Furthermore, Inspector Serrato's statement that he and another inspector felt that Ms. de Hernandez "fit the profile" of a narcotics smuggler does not turn an inarticulate hunch into reasonable suspicion.

"...what is significant for the reasonable suspicion standard is not the presence of generalized profile characteristics but articulable individualized suspicious behavior."

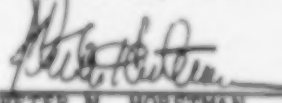
United States v. Castenada-Castenada, 729 F.2d 1360, 1363 (11th Cir. 1984); Accord, United States v. Mejia, 720 F.2d 1378, 1382 (5th Cir. 1983).

As the Ninth Circuit stated in the opinion below, "... thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent." 731 F.2d at 1372.

CONCLUSION

No x-ray search could have been justified in the case at bar even if the Ninth Circuit Court of Appeals had employed the reasonable suspicion standard currently utilized by the Eleventh and Fifth Circuits. Therefore, this case presents a poor vehicle for a dispositive exposition of the Fourth Amendments rights of persons entering this country who are suspected of drug smuggling. The petition for a writ of certiorari should be denied.

Respectfully submitted,



PETER W. HORSTMAN
Federal Public Defender

DATED: January 9, 1984.